should be considered sufficient if it satisfies the elastic principle of the law of attempt, that is, that it be an act in execution of the intent and going beyond mere preparation. It should not be permissible to take the word "assault" from its context and subject it to the gruelling of six centuries of critical definition. We should remember the words of Justice HOLMES, "The life of the law has not been logic: it has been experience."

Such a broad reading of the word "assault" is obviously involved in those cases, representing the majority view, which hold that an attempt to have intercourse with a girl, of such age that intercourse with her would be statutory rape, is assault with intent to rape, even though the girl consents to all that is done. MCCLAIN, § 464. If it be said that the girl is incapable of consenting, a yet looser statutory construction is involved. In the absence of any statute she was capable of consenting to intercourse and to any touching of her person not endangering life or limb, and the statute making intercourse with her a crime does not say she is incapable of consenting, but simply ignores completely the matter of consent. The act of intercourse is made criminal without the elements of non-consent and force which are essential to common law rape. This leaves her capable of consenting to a touching of her person not accompanied by the intent to take sexual liberties, and to say that it deprives her of capacity to consent to a touching with such intent is to read into the statute a provision which is not there. It is not merely a broad reading of the terms used by the legislature, it is an addition to a quite specific statute, of a quite specific provision covering a different, though related, subject-matter. It would seem much more permissible to say that in the other statute, punishing the assault with intent, "assault" was used in a somewhat loose sense. See *Russell* v. *The State*, 64 Kas. 798.

Two Georgia cases have refused to come to this conclusion in regard to aggravated assault. The case of *Peebles* v. *State*, 101 Ga. 585, held that putting poison into a well, with the intention that others should be killed by drinking the water, was not an assault with intent to commit murder unless the water was in fact drunk. The court dismissed the case briefly, saying, "As there was no assault proved, the conviction cannot be sustained." This case was followed by *Leary* v. *State*, 13 Ga. App. 626, commented upon in 12 MICH. LAW REV. 230. The result is obviously unsatisfactory. The present case, though doubtful on authority, pays a real regard to the purpose of statutory aggravated assault, and seems justified by the historical and criminalogical situation of the law of criminal attempts. R. W.

PRIORITY OF LIEN OF JUDGMENT.—By a recent decision of the New York Court of Appeals (*Hulbert* v. *Hulbert, et al.*, 111 N. E. 70) there has, in effect, been a check placed upon the rights of "the diligent." In that case the court held that as between several judgments becoming liens simultaneously upon after-acquired property of a judgment debtor, one of such judgments does not acquire a preference by issue of execution and advertisement

and sale thereunder by the sheriff before proceedings are taken on the other judgments.

At common law, except for debts due the king, the lands of a debtor were not liable to the satisfaction of a judgment against him, and consequently no lien thereon was acquired by a judgment. "This was in accordance with the policy of the feudal law, introduced into England after the Conquest, which did not permit the feudatory to charge, or to be deprived of, his lands for his debts, lest thereby he should be disabled from performing his stipulated military service, and which, moreover, forbid the alienation of a feud without the lord's consent. The goods and chattels of the debtor, therefore, and the annual profits of his lands, as they arose, were the only funds allotted for the payment of his debts. This continued to be the law until the passage of the statute of Westminster 2nd, 13 Edw. I, c. 18 (1285), by which, in the interest of trade and commerce, the writ of elegit was for the time provided for. By that statute the judgment-creditor was given his election to sue out a writ of *fieri facias* against the goods and chattels of the defendant, or else a writ commanding the sheriff to deliver to him all the chattels of the defendant (except oxen and beasts of the plough) and a moiety of his lands until the debt should be levied by a reasonable price or extent. When the creditor chose the latter alternative, his election was entered on the roll, and hence the writ was denominated an elegit, and the interest which the creditor acquired in the lands by virtue of the judgment and writ was known as an estate by elegit." *Hutcheson* v. *Grubbs*, 80 Va. 254. At an early day the courts held that the statute impliedly created a lien upon the land (in most cases, from the day the judgment was entered), lest by fraudulent conveyance the writ of elegit should be defeated. This was the origin and the only foundation of the judgment lien in England. (2 Henry 4th, P. 14, Pl. 5.) This doctrine was followed in the Virginia case above quoted and in the courts of several other states. It will be at once apparent that the right thus conferred upon the creditor gave rise to a true judgment lien, although it differed materially, both in its extent and the manner of its enforcement, from the type with which we are now familiar. The ultimate basis, therefore, of the lien of a judgment on land is to be found in the authority of the statutes.

A general lien upon land by judgment does not constitute per se a property in the land itself, but only gives a right to levy on the same to the exclusion of adverse interests subsequent to the judgment. A judgment creditor has neither a *jus in re* nor *jus ad rem* in the debtor's land, but only the right to make his lien effectual by a sale under execution. I BLACK, JUDGMENTS, § 400.

The rule obtaining in a majority of the states is that, as between judgments entered of record on the same day, there is no priority, for the law cannot in this case regard fractional parts of a day, and all such judgments create equal liens. If all such judgment creditors should remain inactive the several judgments would have an exact equality of lien. But ought that equality to continue, where one creditor by his superior activity and diligence

has, at his own cost, caused execution to be levied upon property of the common debtor and advertisement and sale thereunder to be made? The New York court has, by a four-to-three decision, answered this in the affirmative, and by so doing has over-ruled two of its prior opinions. (*Adams* v. *Dyer,* 8 Johns, 347; *Waterman* v. *Haskins,* 11 Johns, 228), which have been quite generally cited and followed in other states. The court in the principal case justified itself in part as follows: "In the case now under consideration the liens of the three judgments attached simultaneously to the property of Hulbert upon his acquisition of the interest derived from his father. By virtue of the statute they were at that time equal liens entitled to share pro rata in the proceeds of the debtor's property. Such being the case, how can it be held that the issuing of the execution and the advertising by the sheriff—acts which would be an idle ceremony—should give preference to the creditors? Once a lien is acquired it is a right which cannot be lost by the performance of an unnecessary act of another creditor."

As said before, the judgment creditor has no right in the debtor's land, but only a right to make his lien effectual by a sale under execution. Is it then "idle ceremony" to be diligent and have the lien effectuated? "All judgments obtained at the same term are on an equality as to lien. The statute did not design to deprive a party of any advantage that he might obtain by the exercise of superior diligence. While the lien was made equal, diligence was left to its reward. Under the general law the lien of judgments is equal, but the vigilant creditor can acquire a preference in the payment of his judgment, although it has but an equal lien, by first issuing his execution. If one creditor, who is precisely equal to another in point of lien, shall get advantage by use of superior diligence in discovering property, making a levy and sale of it, where is the hardship or injustice? If the property is sold below its value, the right of redemption and resale remains to the other judgment creditors. There is certainly some merit in searching records, discovering property, investigating title, and procuring sale of it, and all at the creditor's costs and expense, by which he ought to profit. Both of these judgment creditors were in a position to use diligence —one only encountered the labor and expense. To him should be the reward. *Vigilantibus, non dormientibus, jura subveniunt." Smith* v. *Lind,* 29 Ill. 24. To the same effect, see *Elston* v. *Castor,* 101 Ind. 426, 51 Am. Rep. 754; *Michaels* v. *Boyd,* 1 Cart 259; *Burney* v. *Boyett,* 1 How. (Miss.) 39; *Lippincott* v. *Wilson,* 40 Ia. 425; *Shirley* v. *Brown,* 80 Mo. 244; 2 FREEMAN, JUDGMENTS, § 374; I BLACK, JUDGMENTS, §§ 450, 455; 23 CYC. 1380. The above rule has been cited with approval in *Rockhill* v. *Hanna,* 15 How. 194; *Freedman's Trust Co.* v. *Earle* 110 U. S. 717, 28 L. ed. 304. If the cases above referred to are taken for what they are worth, it might be reasonably doubted whether the New York court was justified in sweeping aside the rule of *Adams* v. *Dyer* and *Waterman* v. *Haskins,* supra, established since 1811.

H. B. S.